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No. 92-210

In The

Supreme Court of the United States

October Term, 1992

CLARENCE DUPNIK, the Sheriff of Pima County, Arizona; THOMAS TAYLOR; WEAVER J. BARKMAN; PETER RONSTADT, Chief of Police, Tucson, Arizona, and KAREN WRIGHT,

Petitioners,

v.

MICHAEL COOPER and LIDIA COOPER, husband and wife, in their own capacity and as parents of ABRAM COOPER and ADAM COOPER, minors,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. When an arrestee's unequivocal requests for counsel are intentionally disregarded pursuant to a premeditated and officially sanctioned police plan, does coercion of statements from the arrestee ripen into a constitutional violation only if the statements are used against him in a proceeding?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

THE FORMATION OF THE PRIME TIME RAPIST TASK FORCE AND THE INTERROGATION PLAN 2

THE ARREST AND INTERROGATION OF MICHAEL COOPER 5

THE INTENT TO COERCE; KNOWLEDGE OF WRONGDOING 9

THE EFFECTS OF THE COERCIVE INTERROGATION 10

REASONS FOR DENYING THE WRIT 10

A. THE UNIQUE FACTS OF THIS CASE ARE ILL-SUITED TO THE ANNOUNCEMENT OF BROAD LEGAL PRINCIPLES 10

B. THIS CASE RAISES NO ISSUE OF QUALIFIED IMMUNITY 12

C. THERE IS NOT NOW NOR WILL THERE EVER BE A FLOOD OF CASES LIKE THE CASE AT BAR 13

D. THE COLLATERAL ORDER DOCTRINE IS NOT APPLICABLE TO THIS CASE IN ITS PRESENT POSTURE 14

E. THE STATEMENTS DRAWN FROM RESPONDENT WERE COERCED 15

TABLE OF CONTENTS – Continued

Page

F. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL IN REGARD TO THE ONLY QUESTION PROPERLY PRESENTED BY THE PETITION 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES:

Allen v. Illinois, 478 U.S. 364 (1986) 17

Brown v. Mississippi, 297 U.S. 278 (1936)..... 16

Brown v. Walker, 161 U.S. 591 (1896)..... 16

Buckley v. Fitzsimmons, 919 F.2d 1230 (7th Cir. 1990)..... 18

Edwards v. Arizona, 451 U.S. 477 (1981).....13, 14

Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989)..... 15

Lefkowitz v. Turley, 414 U.S. 70 (1973)..... 17

Leyra v. Denno, 374 U.S. 556 (1954)..... 11

Malinsky v. People of New York, 324 U.S. 401 (1944) 11

Malley v. Briggs, 475 U.S. 335 (1986).....15, 17

McCarthy v. Arndstein, 266 U.S. 34 (1924)..... 17

McNeil v. Wisconsin, ___ U.S. ___, ___, 111 S.Ct. 2204, 2207, 115 L.Ed.2d 158 (1991)..... 11

Mincy v. Arizona, 437 U.S. 385 (1978)..... 10

Minnesota v. Murphy, 465 U.S. 420 (1984)..... 17

Mitchell v. Forsyth, 472 U.S. 511 (1985) 12

Nixon v. Fitzgerald, 457 U.S. 731 (1982)..... 15

Rex v. Teeples, 753 F.2d 840 (10th Cir. 1985)..... 18

Spano v. New York, 360 U.S. 315 (1959) 11

State v. LaGrand, 153 Ariz. 21, 734 P.2d 563 (1987) 3

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CODE:

18 U.S.C. § 241 11

RULES:

Supreme Court Rule 15.1 14

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Respondents respectfully pray that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed May 5, 1992 be denied.

STATEMENT OF THE CASE

The facts of this unique case are set forth in considerable detail in the *en banc* opinion of the Ninth Circuit. Because the Petitioners' factual recitation of the case is inaccurate, incomplete, and misleading, Respondents have included their own Statement of the Case.[1]

THE FORMATION OF THE PRIME TIME RAPIST TASK FORCE AND THE INTERROGATION PLAN

For some two years prior to the arrest of the Respondent, Michael Cooper (hereinafter "Cooper"), the Tucson metropolitan area was beset by a series of violent sexual assaults and related crimes believed by law enforcement officials to have been perpetrated by a single individual, dubbed the "Prime Time Rapist" (PTR).[2]

In April, 1986, the Pima County Sheriff's Department and the Tucson Police Department combined to form a joint Task Force, which became known as the "Prime Time Rapist Task Force" (hereinafter "the Task Force").

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[1] References to the Ninth Circuit's *En Banc* Opinion, which is set forth in Appendix B of the Petition for Certiorari, will be as follows: (App. B ___). Additionally, the Opinion references quotes from depositions taken during the course of pretrial discovery and the specific references are to the Excerpt of Record submitted by the Respondents consisting of a 53 page summary of the depositions, numbered sequentially in paragraph form. References herein will also be made to that Excerpt as follows: Exhibits-Vol. 1, No. ___.

[2] The PTR "earned" his nickname because of his penchant for breaking into houses during so-called prime-time television viewing hours.

The goals and objectives of the Task Force were to identify, locate, apprehend, and successfully interrogate the PTR. (Exhibits-Vol. 1, No. 0182).

On May 7, 1986, the Task Force had in place an official interrogation plan designed for any PTR suspect or arrestee. At the core of the plan was a specific decision and plan to interrogate the suspect, even if a request for counsel was made. (Exhibits-Vol. 1, Nos. 0012, 0014). The interrogation plan had several goals and purposes:

a) To wear down the suspect and induce a confession;

b) To prevent the suspect from testifying at his own trial;

c) To deprive the suspect of an opportunity of forming an insanity defense;

d) To prevent the suspect from contacting an attorney, who in all likelihood would tell him to remain silent, thus preventing an interrogation. (Exhibits-Vol. 1, Nos. 0028, 0071).

The interrogation plan was well known among all of the Task Force members. There were discussions at briefings regarding the mechanics of the interrogation plan. At those meetings it was made known to the members of the Task Force that a request for counsel was not to be honored. Sergeant Taylor, the Task Force's supervisor, designated Detective Barkman as the primary interrogator because Taylor was confident in Barkman's ability to get results. (App. B 56-57). Barkman was an experienced interrogator of some considerable repute. *See, e.g. State v.*

LaGrand, 153 Ariz. 21, 734 P.2d 563 (1987). Barkman informed a variety of higher police officials about the interrogation plan, including a face-to-face conversation with Pima County Sheriff, Clarence Dupnik, a Petitioner herein, as well as Tucson Police Department Assistant Chief of Police, Captain Michael Leverenz. (Exhibits-Vol. 1, Nos. 0018-20, 0022, 0023).

Petitioners incorrectly assert that the use of interrogation plan was dependent on strong, prior proof of guilt. In fact, the interrogation plan predated the PTR case by six years, and depended upon mere suspicion rather than "strong proof" of guilt. Since at least 1981, Pima County Sheriff's Detectives, in their discretion, would continue to interrogate suspects even in the face of an invocation of the right to counsel or to remain silent. (Exhibits-Vol. 1, Nos. 0016-17). The sheriff of Pima County admitted that, in a variety of circumstances, his department condones continued interrogation despite a request for counsel. (App. B 66-67). Moreover, Detective Wright testified that the investigators in the Cooper case decided to conduct the interrogation even where counsel was requested, not because the case was strong, but because "they had very little evidence in terms of all of the cases involved." (Exhibits-Vol. 1, No. 0031). The plan to deny a request for counsel had therefore both investigatory and proof dimensions.

John David Harrell was the first suspect caught in the Task Force net. Despite his request for counsel, he was interrogated by Detective Barkman, who stated:

> "We decided it was going to be very clear cut, forget his *Miranda* rights, the hell with it. . . . "

* * *

> " . . . those were my motives for violating, trampling on his (Harrell's) civil rights and *Mirandas*, and the bottom line being, what are his damages. I mean, I'm going to violate this American citizen's rights, but look at the totality of the circumstances, the big picture, is it worth it, yeah. (App. B 63-65).

John David Harrell turned out not to be the PTR, and the Task Force looked for another suspect. They found Michael Cooper who had been previously convicted of welfare fraud.

THE ARREST AND INTERROGATION OF MICHAEL COOPER

On May 7, 1986, Tucson Police Department I.D. Technicians examined two sets of latent palm prints found at the scenes of crimes attributable to the PTR, and concluded those latents matched those of Michael Cooper. Even though they had no other evidence that Cooper was the PTR and even though Cooper's criminal history was inconsistent with violent sexual attack, they determined to bring him in for interrogation based solely on his prints.[3]

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[3] These print results performed by TPD technicians were later discredited and determined not to be those of Mr. Cooper. A expert witness from the Arizona Department of Public Safety characterized the TPD fingerprint technician's original actions in concluding the prints matched those of Cooper as "incomprehensible". (App. B 67-68, n.2).

Detectives Barkman and Wright confronted Cooper at the Pima County Probation Department, under orders from their superior, Sergeant Taylor, to arrest Cooper. He was advised of his *Miranda* rights, but Barkman did so in a joking fashion, which was a psychological ploy designed to make Cooper ignore the warnings and waive his right to silence and right to counsel. (App. B 69, 70). This psychological ploy was the first step in implementing the interrogation plan. Initially, Cooper did agree to speak with the detectives, and there ensued an approximately thirty minute conversation which was tape recorded. At the conclusion of that conversation, Cooper was placed under arrest, and immediately made the first of his several unequivocal requests for counsel. (App. B 70, 71). Questioning Cooper at this point ceased, not in deference to his request for counsel, but merely to enable the officers to transport him to the Pima County Jail, where the interrogation would continue.

In accordance with the interrogation plan, Sergeant Taylor placed a surreptitious microphone in the interrogation room of the Pima County Sheriff's Department. (Exhibits-Vol. 1, No. 0010). Upon arrival at the Sheriff's Department, Wright told Taylor that Cooper had requested counsel, but Taylor followed the interrogation plan, and ordered the interrogation to continue.

Wright began interrogating Cooper again, despite the fact that she knew he had previously requested counsel and that such a request was required by law to be scrupulously honored. Her decision not to honor that request and to continue the interrogation was an intentional one and in accordance with the pre-arranged plan by the Task Force. (Exhibits-Vol. 1, Nos. 0011, 0030, 0032). Contrary to

the impression created by the Petitioners, this interrogation was well under way before Wright, in a passing manner, asked Cooper if he was aware of his rights and whether he had "any problem" talking to her. To which Cooper responded that he did.[4] Observing that Wright's interrogation was not succeeding, Barkman took over, indicating to Taylor that he intended to "go in there [the interrogation room] and hammer him". (App. B 71). Barkman then took over the interrogation and the coercion which is at the heart of this lawsuit accelerated.

Barkman principally used a technique he called the "direct positive confrontational" approach, which was designed to create a sense of hopelessness, to cause the suspect to become angry, mad, and upset, to cause stress and fear, and to tap into the suspect's emotional state. (App. B 60). At one point, Barkman played on the fact that Cooper was Jewish, telling Cooper that "to be Jewish is to be guilty." (App. B 77). Although Detective Wright claimed that the interrogation produced statements that "substantiated Cooper's involvement in the cases", Cooper, of course, never confessed. At one point, Barkman left the interrogation room and informed Sergeant Taylor that he did not believe that Cooper was the PTR. (App. B 79, 91, 92). Sergeant Taylor, however, ordered him to return to the interrogation room and continue. Barkman

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[4] The implication arising from Petitioners' Statement of Facts is that Cooper waived his right to counsel at this point. Aside from the fact that such an implication blatantly misstates the Petitioners' own witnesses, it marks the very first instance in the long history of this case that Petitioners have even hinted at a claim of waiver. That issue is simply not presented by the record in this case.

refused to do so, at this point, because he believed Cooper was the "wrong guy" and was therefore concerned about "potential liability". (App. B 79-80). Barkman, however, subsequently overcame his hesitation and resumed the interrogation.

Because of the doubts being raised, Sergeant Taylor contacted a print examiner from the Tucson Police Department and requested that she come to the Sheriff's Department and reprint Cooper. Mary Kay McCall, not one of the original print examiners, responded, and upon entering the Sheriff's Department was met by Sergeant Taylor who told her "I want to try to force a confession out of this man." (App. B 80).[5] After McCall left the Sheriff's Department, Barkman suppressed his doubts and resumed his interrogation of Cooper until approximately 7:30 p.m. (Exhibits-Vol. 1, No. 0044). Toward the end of Barkman's interrogation, Cooper made another unequivocal request for counsel. Once again, the interrogation did not cease.[6] Cooper was turned over to other members of the Sheriff's Department, including Sergeant Taylor, who took samples of physical evidence from him, and during the course of that process continued to

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[5] McCall reprinted Cooper, and although she had doubts, told the PTR Task Force that the prints matched. When she later returned to the Tucson Police Department and completed her examination, she concluded there were no matches.

[6] The Petitioners state that the interrogation of Cooper ended when he insisted on contacting a lawyer. (See Petition at pg. 5). Again, implying that the police were honoring Cooper's request for counsel, which is simply untrue.

interrogate him. Cooper was finally booked into the Pima County Jail, but he was never permitted to contact an attorney.

On the following morning, Sergeant Taylor was informed that the fingerprint comparisons did not match. As a consequence, a TPD fingerprint technician, Scott, met with Sergeant Taylor and Detectives Barkman and Wright. Although the fingerprint match was officially withdrawn, and Barkman believed that they had the wrong man, Sergeant Taylor still wanted to hold Cooper and proceed with the prosecution. Using the parlance of the gaming casino, Taylor stated that his basis for wanting to continue to prosecute Cooper was "I was betting on the come." (App. B 82, 83). Nevertheless, Cooper was released from custody later that afternoon. His innocence is unquestioned.

THE INTENT TO COERCE; KNOWLEDGE OF WRONGDOING

According to Sergeant Taylor the plan was to emotionally wear down Cooper and induce him to confess. (App. B 59). Taylor also told Co-Defendant McCall, that "I want to try and force a confession out of this man." (App. B 80; Exhibits-Vol. 1, Nos. 0028). Sergeant Taylor knew the interrogation plan violated the law. (Exhibits-Vol. 1, Nos. 0029). Detective Wright was aware that a request for an attorney must be scrupulously honored, but she intentionally did not honor Cooper's request for counsel. *Id.* 0030-32. The chief interrogator, Barkman, indicated that he was going to "go in there and hammer him"; "the plan was to be clear cut – forget his *Miranda* rights, the hell with it. . . . " (App. B 63, 71).

THE EFFECTS OF THE COERCIVE INTERROGATION

It is undisputed that Michael Cooper was innocent. While he did not confess, the coercive interrogation techniques had their desired effect on him and "statements" were drawn from him. Detective Wright observed his stress level continually building up, and characterized Cooper as extremely upset, crying, sobbing and angry. (Exhibits-Vol. 1, Nos. 0046-47). Significant, illustrative portions of the interrogation are found in the Ninth Circuit Opinion. (App. B 72-77).

According to Dr. Todd Flynn, a certified practicing psychologist in the State of Arizona, Cooper suffers from chronic post-traumatic stress syndrome as a result of the interrogation. (Exhibits-Vol. 1, Nos. 0051, 0056). The statements he made, even though he was innocent, were the direct product of the interrogation and were intended to be used if a case against him actually developed.

REASONS FOR DENYING THE WRIT

A. THE UNIQUE FACTS OF THIS CASE ARE ILL-SUITED TO THE ANNOUNCEMENT OF BROAD LEGAL PRINCIPLES

The *en banc* opinion stressed repeatedly that its holding was limited to the outrageous facts presented in this case. (*See, e.g.*, App. B at 109). Although Petitioners seek to present this case as a garden variety example of the police simply failing to follow *Miranda*, it is not. Rather, this case involves an intentional and calculated effort to eviscerate the rule developed by this Court in the line of cases beginning with *Mincy v. Arizona*, 437 U.S. 385 (1978)

and most recently applied in *McNeil v. Wisconsin*, ___ U.S. ___, ___, 111 S.Ct. 2204, 2207, 115 L.Ed.2d 158 (1991). Here, an official plan was employed in order to deprive Respondent of his constitutional rights and ultimately lead to the coercion of statements from him. There is no merely "benign" or "technical" *Miranda* violation in this case.[7]

Several categories of unique facts were critical to Judge Trott's opinion. The police misconduct in this case was not inadvertent; it was the product of a plan that had been in place for many years. The police *knew* their plan was illegal; indeed, they have indicated they believed it was a violation of Cooper's civil rights. The *express purpose* of the plan was that which the law expressly forbids: to coerce a confession. *See* pg. 8, *supra*. Precisely those tactics which have been repeatedly condemned by this Court over the years were employed in combination in this case.[8]

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[7] As the *en banc* opinion makes clear, the conduct of the task force officials in this case may well have constituted a *prima facie* case of criminal conspiracy. 18 U.S.C. § 241 criminalizes any conspiracy to intimidate anyone in the "free exercise or enjoyment" of any right or privilege secured by the Constitution. Petitioners have conceded that one of the objectives of the illegal interrogation was to "keep Cooper off the stand". (App. B, n.10).

[8] *See, e.g.*, the false friend technique, appeals to religion, lying to a suspect, repeated interrogations to induce a sense of hopelessness, denying requests for counsel, attempts to induce fear. *See, e.g., Leyra v. Denno*, 374 U.S. 556 (1954); *Spano v. New York*, 360 U.S. 315 (1959); *Malinsky v. People of New York*, 324 U.S. 401 (1944).

As the *en banc* panel's opinion makes clear, no one fact was critical to the constitutional violation in this case. It was the aggregation of the improper motivations, coupled with the coercive and improper tactics actually employed, that violated Cooper's civil rights. These unique facts make this case particularly inappropriate for the announcement of a generally applicable rule and therefore inappropriate for the explication of national policy by this Court.

B. THIS CASE RAISES NO ISSUE OF QUALIFIED IMMUNITY.

Petitioners' appeal to the Ninth Circuit was from a denial of their Motion for Summary Judgment based upon a claim of qualified immunity, but this case does not raise any such issue. The doctrine of qualified immunity was designed to ensure that public officials would not be chilled in the exercise of their public duties. The law seeks to insulate public officials from concerns regarding private liability where the public official could not reasonably be expected to know that his conduct violated the law. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). At the same time, where the official knows that his conduct violates statutory or constitutional rights, "he should be made to hesitate". *Id.* at 524.

There is no question that these Petitioners should have known that their conduct violated Cooper's constitutional rights. Indeed, there is no question that they in fact knew their conduct would violate his rights. Petitioners themselves have never claimed ignorance of the law as an explanation for their actions. Instead, they

claim the right to defy the very law they admit they know, so long as they refrain from using the evidence they gain in their case in chief. Each of the police officials who participated in the interrogation in this case has admitted that he or she actually knew their conduct violated Cooper's civil rights. A case in which police officials engaged in a premeditated and calculated plan which they believed violated a citizen's constitutional rights, and which may have in and of itself constituted a criminal conspiracy, raises no legitimate issue of qualified immunity, which is intended to protect only those who act in "good faith" of either the subjective or objective variety.

C. THERE IS NOT NOW NOR WILL THERE EVER BE A FLOOD OF CASES LIKE THE CASE AT BAR.

Petitioners suggest that the Ninth Circuit's opinion will "open the floodgates" to civil rights litigation of "technical" *Miranda* violations. But the Petitioners have not demonstrated the existence of the storm that is predicate to the flood. Even assuming *a priori*, as the Petitioners clearly do, the existence of widespread, technical violations of *Miranda* rights, there is absolutely no showing that this case involves anything other than a blatant and concerted attempt to override the product of legal principles clearly established by this Court's decision in *Edwards v. Arizona*, 451 U.S. 477 (1981). There is no showing that such unlawful interrogation plans occur outside of Pima County, Arizona, either regularly or for that matter, at all.

The *en banc* opinion was carefully limited to instances of premeditated, knowing and intentional violations of clearly established bright line rules coupled with the use of coercive tactics. (App. B 109). Petitioners hypothesize a "flood" of cases with facts like these. Yet, the cases they cite are ones in which a court simply ruled that a failure to advise someone of their "*Miranda* rights" did not constitute a civil rights violation. They do not cite a single case in which an appellate court has ever considered facts even remotely like those presented in the instant case. Though hypothesizing a flood, Petitioners cannot even point to a puddle.

In short, in the twenty-six (26) years since the announcement of *Miranda* and the subsequent addition of the bright line rule of *Edwards v. Arizona*, this is the first reported case in which the police have intentionally chosen to defy this Court's teachings for tactical advantage at trial. This Court should not undertake review of factual situations that recur less than once a generation, and it can be confident that no deluge of litigation will result from the Ninth Circuit's opinion.

D. THE COLLATERAL ORDER DOCTRINE IS NOT APPLICABLE TO THIS CASE IN ITS PRESENT POSTURE.

Pursuant to Supreme Court Rule 15.1 Respondents bring to the attention of the Court the following jurisdictional problem. The Court of Appeals was correct in its conclusion that the "constitutional tort" of coercion of incriminating statements is complete upon extraction of

the statement. There can be no claim of qualified immunity in regard to the coercion claim because the constitutional prohibition against coercion is so clear and longstanding that no reasonable police officer could have entertained even a moment's doubt about the issue. *Malley v. Briggs*, 475 U.S. 335 (1986). The defendants will therefore stand trial on that issue, and no other issue presented in the petition is "separable from, and collateral to" that issue. Appellate jurisdiction in this case is dependent upon the collateral order doctrine and since the coercion issue that will be tried and the issues Petitioners seek to present here are identical, this Court lacks jurisdiction. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989).

E. THE STATEMENTS DRAWN FROM RESPONDENT WERE COERCED

The Ninth Circuit concluded that "[i]n summary, Cooper's statements were both compelled and involuntary." (App. B 121). Although the Petitioners labor mightily to cloud the clarity of the issue, the holding of the Court of Appeals could not be more explicit. This case is about coercion. Judge Trott, in connection with his holding that "the due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself", observed:

> The Supreme Court in 1936 established clearly and beyond anyone's misapprehension the proposition that the Constitution, as a limit on the behavior of government officials, flatly prohibits coercion in the pursuit of a statement

> from a person suspected of a crime. *See, Brown v. Mississippi*, 297 U.S. 278 (1936). (App. B 110-111).

The complaint adequately alleges intentional coercion of Respondent during his "inquisition". There is simply no law that says, implies or even remotely suggests, that investigatory coercion is constitutionally permissible so long as the state does not use any coerced statements in their case in chief. The contrary is the established law at least from the time of *Brown v. Mississippi, supra*. In fact, the prohibition against coercion during investigation goes back to colonial days:

> The maxim, '*Nemo tenetur seipsum accusare*,' had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne, in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England . . . So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law; so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment. *Brown v. Walker*, 161 U.S. 591 (1896).

Coercion in the investigative stage of criminal litigation violates the fundamental law of the nation. That law was clear and well established on May 7-8, 1986 just as it was in 1896. No reasonable police officer could have

thought otherwise. The law of qualified immunity does not protect the "plainly incompetent or those who knowingly violate the law". *Malley v. Briggs, supra.*

The fact that the suspect is not brought to trial is simply irrelevant to the issue of coercion. While the panel opinion, (App. A 19), and the Petition baldly assert that a Fifth Amendment self-incrimination violation does not exist until there is use of the statement at trial, neither cites a single case that so holds. In fact, the law as articulated by this Court is perfectly clear:

> This Court has long held that the privilege against self-incrimination "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.' " *Minnesota v. Murphy*, 465 U.S. 420 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70 (1973)); *McCarthy v. Arndstein*, 266 U.S. 34 (1924); *Allen v. Illinois*, 478 U.S. 364 (1986).

Judge Trott, no novice in the prosecution of criminal cases, described the conduct of Petitioners in the most vivid terms: ["star chamber", "nightmare" (App. B 107, 121)]. The facts of this unusual case would support a jury finding that Petitioners knowingly carried out a pre-existing interrogation plan that was intended to coerce Cooper and violate his Fifth Amendment rights. Since the law regarding coercion is and was clear and was knowingly and intentionally violated, the fact that Petitioners knew that they probably could not offer any statements made by Cooper in their case in chief is irrelevant.

F. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL IN REGARD TO THE ONLY QUESTION PROPERLY PRESENTED BY THE PETITION.

There is no conflict among the circuits in regard to the principles relating to coerced statements where the injury is complete before the judicial process has begun. The only courts that have addressed the precise issue have ruled in accord with the *en banc* panel in this case. *Rex v. Teeples*, 753 F.2d 840 (10th Cir. 1985); *Buckley v. Fitzsimmons*, 919 F.2d 1230 (7th Cir. 1990). No reasonable police officer could have believed that it was permissible to illegally coerce statements from suspects just because the prosecution was willing to withhold them from use in their case in chief. A moment's reflection reveals the monstrosity of such an assertion. If that were the law, the police could at their will or whim beat, torture, or psychologically abuse a suspect without accountability through the simple expedient of withholding the statements from the trial and making their case with other evidence. That has never been the law in this country and no case in any circuit or any state court of which we are aware says that it is.

There is, however, conflict in regard to an issue that is plainly *not* presented by this case. That issue is the question of whether the failure to give a *Miranda* warning gives rise to a viable § 1983 claim. A number of courts have held that such a failure does not rise to the level of a § 1983 violation, and they are cited and discussed at length in the Petition and the panel opinion. But those cases have nothing whatever to do with this case in

which everybody admits that full and appropriate *Miranda* warnings *were* given and unequivocal requests for counsel were intentionally disregarded. This case is, therefore, *not* based upon the failure to give *Miranda* warnings. This case *is* based on an unsuccessful attempt to coerce a confession, following the planned and intentional failure to respect an unequivocal demand for consultation with counsel.

CONCLUSION

For all the reasons previously stated, this case presents no issue appropriate for the exercise of this Court's jurisdiction. Accordingly, the Petition for Writ of Certiorari should be denied.

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